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MUHAMMAD NOR HELMY MOHD SURAH v. MOHAMAD SYAHAMIRUL AIZAT MOHD ALI & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
MOHD NAZLAN GHAZALI JC
[CIVIL APPEAL NO: 12B-9-02-2015]
B 15 FEBRUARY 2016

DAMAGES (PERSONAL INJURY OR DEATH): *Personal injuries – Global award – Whether award for combined effect should be applicable – Whether injuries sustained primarily stemmed from intra-abdominal injury – Whether global award*
C *manifestly low – Whether appellate intervention justified*

DAMAGES (PERSONAL INJURY OR DEATH): *Personal injuries – Multiple injuries – Whether neurologic deficits affected orientation, powers of reasoning, comprehension and recall – Whether specialist medical reports highlighted specific*
D *disability arising from fracture of radius – Whether trial judge applied correct principles of law*

DAMAGES (PERSONAL INJURY OR DEATH): *Loss of earnings – Loss of ability to earn income – Whether proven on balance of probabilities – Whether loss of future earning proven – Whether appellant demonstrated evidence of real*
E *substantial loss capable of assessment which was not remote or speculative*

DAMAGES (PERSONAL INJURY OR DEATH): *Loss of earning capacity – Whether proven – Whether medical reports shown deficits and disabilities deemed capable of affecting employment prospects*

F This was an appeal against the decision of the Sessions Court Judge ('SCJ') in respect of the quantum awarded to the appellant for injuries sustained in a road accident involving the respondents. The parties were not appealing against the finding of equal liabilities of the parties. The appellant contended that the Sessions Court ought to have first separately identified specific award for each of the three types of injuries before pronouncing a global award. The
G appellant further contended that the SCJ should have considered the combined effect and totality of injuries in accordance with the case laws authorities from jurisdictions such as England and Australia. It was also the appellant's contention that the award of damages for having multiple injuries should be more than the sum of having separate distinct injuries, taking into
H account the combined effect. The appellant further highlighted that the 'combined effect' approach was already recognised in the Malaysian Compendium of Personal Injuries Award ('the compendium').

Held (dismissing appeal with costs):

I **(1)** On the issue of the global award for grade III liver injury, grade II splenic injury and grade II right kidney injury, an award for combined effect should not be applicable because the nature and impact of the injuries sustained at the three organs were not comparable to loss of both

eyes or both hands. The injuries sustained by the appellant primarily stemmed from an intra-abdominal injury. The intra-abdominal injuries and lacerations had been stitched up and addressed, and there was no disability arising therefrom. Even considering the three injuries individually, based on case law authorities, the global award by the SCJ was not manifestly low to justify appellate intervention. The award of RM35,000 for the three injuries was affirmed. (paras 12, 13 & 15)

(2) A review of the report by the neurosurgeon for the defendant disclosed a conclusion that was generally favourable medically in the sense that there were no significant neurologic deficits, apart from a degree of memory impairment, described as a mild impairment of short term recall. Further, the notes of evidence of the proceedings at the Sessions Court did not suggest that the appellant was in any discernible manner adversely affected in terms of his orientation, powers of reasoning, comprehension and recall. The award of RM42,000 was within the range for memory impairment of between RM22,000 and RM49,000 as per the compendium. It was plainly not manifestly low nor tainted by any application of wrong legal principle and was thus reasonable and affirmed. (paras 18 & 19)

(3) In relation to the fracture of right radius the award of RM12,000 was within the range of award for fracture of radius pursuant to compendium of RM11,000 to RM27,500. It was also within the range of award actually granted in precedent cases. In any event, none of the specialist medical reports highlighted any specific disability arising from the fracture of the radius. As such, there was no justifiable basis in law to interfere with the award by the trial judge. (para 22)

(4) Considering the specialist report which did not highlight any breathing problem, the award of RM8,000 for bilateral lung contusion was to be retained. In light of the precedent cases, the award for right haemopneumothorax (with chest tube inserted) was affirmed because it was neither unreasonable nor in any way manifestly low. The court also affirmed the award for the fracture of the right first rib. The appellant could not claim for the fracture of seventh and eighth ribs as the evidence of the fractures were not recorded in the reports and thus not proven. The awards given for right anterior mediastenal haematoma of RM2,500 ought to be maintained for it was within the range of the award for 'external injuries: haematoma' listed in the compendium. The SCJ had not applied a wrong principle of law in rejecting claims for other items of injuries. (paras 25, 27, 28, 30 & 31)

(5) Based on the employment letter and salary slips as well as evidence by the appellant's employer, the claim for the appellant's loss of earning had been proven on a balance of probabilities. Therefore, the amount of RM28,980 for actual loss of earning (being 14 months x RM2,070) was

awarded. However, the appellant had not successfully proven the loss of future earning. The appellant could not demonstrate evidence of real substantial loss that was capable of assessment which was not remote or speculative. (paras 32 & 33)

(6) Based on the evidence including the medical reports which described the deficits and disabilities deemed capable of affecting employment prospects of the appellant as being mild, and taking into account the present condition of the appellant, the appellant had not proven, on a balance of probabilities, his loss of earning capacity. Accordingly, the award of RM20,000 for loss of earning capacity by the SCJ was reversed for lack of evidential support. (para 34)

Case(s) referred to:
Abd Razak Abd Rahman v. Zulkifli Bakar [2013] 1 PIR 2 ***(refd)***
Azmal Zaim Ahmad Azmi v. Zainal Abidin Othman [2014] 1 PIR 3 ***(refd)***
Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(refd)***
Boon Chin Fatt v. Yii Chee Wee & Anor [2014] 1 LNS 1351 HC ***(refd)***
Brown v. Woodall [1995] PIQR Q36 ***(refd)***
Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 17 HC ***(refd)***
Fatimah Derakman v. Wan Jusoh Wan Kolok & Anor [1994] 4 CLJ 537 HC ***(refd)***
Kalaiarsan T Sukumaran v. Khor Lye Choon [2011] 2 PIR 6 ***(refd)***
Lee Boon Leong v. Rubendran Balasegaran Pillai [2014] 1 PIR 72 ***(refd)***
Leong Sit Mooi & 3 Ors v. Ahmad Tajudin Ali & Anor [2014] 1 PIR 31 ***(refd)***
Looi Gnan Peng v. Bay Tong Hai [2005] 1 CLJ 685 CA ***(refd)***
Mahenthiran Anpalakan v. Krishna Rao Sree Ramaloo & Anor [2012] 2 PIR 53 ***(refd)***
Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC ***(refd)***
Mohamad Khirul Mizan Shafie & Anor v. Yue Ah Kai [2002] 8 CLJ 672 HC ***(refd)***
Mohd JM El Halabi & Anor v. Leng Kok Hoong [2013] 1 PIR 12 ***(refd)***
Mohd Norazuan Norhaslim v. Tan Beng Yok [2014] 1 PIR 44 ***(refd)***
Mohd Redzal Hashim v. Wong Kwai Chuen [2008] 1 PIR 7 ***(refd)***
Muhammad Hamzi Omar v. Jemilah Ahmad [2013] 1 PIR 52 ***(refd)***
Muhammad Hazwan Abd Rahman v. Heng Peoy [2014] 1 PIR 46 ***(refd)***
Muhammad Taqiyuddin Omar v. Tan Beng Giap & Anor [2014] 1 PIR 8 ***(refd)***
Nur Nasuha Abd Rahman v. Norihan Kamaruddin & Anor [2012] 2 PIR 54 ***(refd)***
Nur Syamimi Muhammad Zahari v. Nursedia Abdul Rani [2013] 2 PIR 63 ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Samsuri Lajis & Anor v. Mohd Asrul Mohamod [2010] 1 PIR 7 ***(refd)***
Sosmatrides v. Ko Knee Keng [2015] 1 PIR 9 ***(refd)***
Sugumaran Puvalan & Anor v. Mohd Faiz Abd Karim [2011] 2 PIR 39 ***(refd)***
Sumarni v. Yow Bing Kwong & Anor [2008] 3 CLJ 489 CA ***(refd)***
Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300 SC ***(refd)***
Tan Cheong Poh & Anor v. Teoh Ah Keow [1996] 3 CLJ 665 CA ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
Yusof Mohamed v. Lee Mok Sing [2014] 1 PIR 64 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)(i)

For the appellant - Teo Han Lay; M/s Teo & Assocs
For the respondents - Munjeet Kaur; M/s Munjeet Waalib & Assocs

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an appeal against the decision of the learned Sessions Court Judge in respect of the quantum of award granted to the appellant (the plaintiff in the proceedings before the Sessions Court) for injuries sustained from the road accident involving the respondents. The parties are not appealing against liability for they agreed that both the appellant and the respondents (the defendants in the action below) were equally liable for the accident involving the parties.

[2] I decided to dismiss the appeal in respect of the award for injuries apart from allowing the appeal on loss of earnings and reversing the decision of the learned Sessions Court Judge in granting an award for loss of earnings capacity to the appellant. This judgment contains the full reasons for my decision.

Brief Background

[3] The appellant, a dispatch rider at the time of the accident, was riding a motorcycle which got involved in a road accident at KM 3 Jalan Skudai, Pantai Lido, Johor on 7 January 2013 at around 1.50am with a motorvan driven by the first respondent. The second respondent was the registered owner of the motorvan at the material time.

Contentions Of Parties And Findings By This Court

[4] For clarity and better appreciation, I shall refer to each of the items of award being appealed against, highlight the essence of the respective submissions of counsel for the parties, and thereafter state my evaluation and findings on them.

[5] Before I outline the contentions of the appellant, it is important that the well-established principles as stated in the Federal Court decision in *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 concerning appeals involving amount of damages be emphasised, as follows:

> ... In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the Plaintiff is entitled. The assessment which the courts have made over the

A years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each particular case ...

[6] The position in law is so settled that the Federal Court in *Mahmod Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68; [1976] 2 MLJ 239 further
B applied a House of Lords' decision and pointedly held as follows:

> The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601, 616, 617 as follows:
>
> C Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases,
> D but a good general guide is given by Greer L.J. in *Flint v. Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered.
> E *It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.* (emphasis added).

[7] I must also add that the learned trial judge had apart from having
F directly observed the appellant and heard his testimony, further benefited from hearing evidence on various medical reports before arriving at her decision on the quantum of awards. These included the following:

(i) imaging report (radiology) by Hospital Sultanah Aminah Johor Bahru dated 7 January 2013;

G (ii) medical report from Hospital Sultanah Aminah Johor Bahru following the discharge of the appellant;

(iii) specialist medical report and radiology report by Columbia Asia Hospital Nusajaya dated 11 October 2013;

H (iv) specialist medical report by Putra Specialist Hospital Melaka dated 27 January 2014;

(v) medical report from Kempas Medical Centre dated 11 March 2014, more than a year after the accident;

I (vi) medical report by Klinik Pakar Neosurgeri Hospital Sultanah Aminah Johor Bahru dated 14 April 2014; and

(vii) specialist media report by Sunway Medical Centre dated 4 August 2014.

Global Award Of RM35,000 For Grade III Liver Injury, Grade II Splenic Injury And Grade II Right Kidney Injury

[8] The appellant argued that the trial court ought to have first separately identified specific award for each of the three types of injury before pronouncing a global award. Thereafter the trial judge, so the appellant contended, should have considered the combined effect and totality of the injuries, in accordance with case law authorities from jurisdictions such as England and Australia. The English case of *Brown v. Woodall* [1995] PIQR Q36 was referred to, and the following part of the judgment of Sir John May highlighted:

> which there are a number of separate injuries, all adding up to one composite effect upon a plaintiff, it is necessary for a learned judge, no doubt having considered the various injuries and fixed a particular figure as reasonable compensation for each, to stand back and have a look at what should be the global aggregate figure and ask if it is reasonable compensation for the totality of the injury to the plaintiff or whether it would in the aggregate be larger than was reasonable? I think that towards the end of a very careful and detailed judgment, the learned judge did err in failing to stand back and look at the case as whole.

[9] In essence the appellant is submitting that the award of damages for having multiple injuries should be more than the sum of having the separate distinct injuries, taking into account the combined effect. It was also highlighted that the "combined effect" approach is already recognised in the Malaysian Compendium of Personal Injuries Award. An example is where the quantum for blindness in both eyes which ranges from RM192,500 to RM198,000 is more than merely doubling the quantum for blindness in one eye, which ranges from RM77,000 to RM82,500.

[10] The appellant thus argued that the award for the three injuries ought to be as follows:

(i) Grade III liver injury: RM50,000. Reference was made among others to *Abd Razak Abd Rahman v. Zulkifli Bakar* [2013] 1 PIR 2 where the similar Grade III liver injury was awarded RM38,000.

(ii) Grade II splenic injury: RM40,000. Reference was made among others to *Nur Nasuha Abd Rahman v. Norihan Kamaruddin & Anor* [2012] 2 PIR 54 and *Nur Syamimi Muhammad Zahari v. Nursedia Abdul Rani* [2013] 2 PIR 63, both involving similar type injury, and in each case the award was for RM50,000.

(iii) Grade II right kidney injury: RM30,000. Reference was made to the Revised Compendium of Personal Injury Awards where removal of one kidney is within the range of RM33,000 to RM38,500.

(iv) The total award for the three injuries being RM120,000, the appellant submitted that an award for a combined effect should be allowed. Applying the excess of about 25% comparing the above said award of

A blindness in both eyes in the compendium as against the double of blindness in one eye, the combined effect for the three injuries should thus be RM120,000 plus 25% and equal RM150,000.

[11] The respondents on the other hand argued that the injuries have resolved such that the appellant was not even referred to a general surgeon B for a specialist report to assess any current disabilities as a result of the intra-abdominal injuries. There is no basis for this court to interfere with the decision of the Sessions Court Judge who had not erred, on the facts or on principles of law. The award was not manifestly low and that the argument of the appellant that an award ought to be made for "combined effect" is C without basis.

[12] In my evaluation, on the issue of the global award for grade III liver injury, grade II splenic injury and grade II right kidney injury, an award for combined effect should not be applicable in the instant case because the nature and impact of the injuries sustained at the three organs are not D comparable to that in the examples of loss of both eyes or of both hands submitted by the appellant. I am of the view that the injuries sustained by the appellant primarily stem from an intra-abdominal injury. The lump sum award is also consistent with the approach by the Court of Appeal in *Tan Cheong Poh & Anor v. Teoh Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ E 89 where VC George JCA, delivering the judgment of the Court of Appeal stated thus:

> Where disabilities stem from one injury, the extent of overlap will be such that there would be a merger and hence, allowance for overlapping in computing the award for pain and suffering and loss of amenities is not F good enough. In this case, all the disabilities suffered by the plaintiff stemmed from one injury, i.e. the brain damage, and thus, the judge was right in making a lump sum award instead of making separate assessments for physical and intellectual disabilities, and to allow for overlap thereafter.

G **[13]** Additionally, the intra-abdominal injuries and lacerations had been stitched up and addressed, and there is no disability arising there from. More importantly, even considering the three injuries individually, case law authorities submitted by both parties show that on balance, the global award by the Sessions Court is not manifestly low.

H **[14]** For grade II splenic injury, the appellant is proposing RM40,000, relying on among others *Nur Nasuha Abd Rahman v. Norihan Kamarudin* [2012] 2 PIR 54 which however, is a case of a more serious grade III splenic injury with an award of RM50,000. Further, in *Nur Syamimi Muhammad Zahari v. Nursedia Abdul Rani* [2013] 2 PIR 63 where the award was similarly I RM50,000, the intra-abdominal injury even resulted in loss of spleen. On the other hand, however, in the case of *Mohd JM El Halabi & Anor v. Leng Kok Hoong* [2013] 1 PIR 12 which also involved grade III splenic injury, the claimant was awarded RM20,000 even though there were also injuries to

both the kidney and the liver, just like in the instant case. For grade III liver injury, although the case of *Abd Razak Rahman v. Zulkifli Bakar* [2013] 1 PIR 2 involved the award of RM38,000, the case of *Muhammad Taqiyuddin Omar v. Tan Beng Giap & Anor* [2014] 1 PIR 8 involved less than half that amount, at only RM15,000, for the same grade III liver injury.

[15] Accordingly, the award of RM35,000 for the three injuries in this case cannot be said to be manifestly low to justify appellate intervention. Therefore the award of RM35,000 by the Sessions Court for the three injuries is affirmed.

Moderate Head Injury

[16] The Sessions Court awarded RM42,000 for "moderate head injury without skull fracture and intracranial bleeding of intraparenchyama types and haemorrhagic contusion". This is higher than the amount proposed by the respondents at RM30,000 and very much lower than the contention of the appellant that it ought to be RM200,000 since it was argued that the appellant suffered a severe head injury. The appellant had been warded in the ICU for the same. The medical report by Putra Specialist Hospital Melaka identified the deficits exhibited by the appellant which included mild impairment of recent memory and of logical thinking as well as mild headaches and easy fatigability. Counsel for the appellant cited several cases to support the stance of the appellant. These included *Kalaiarsan T Sukumaran v. Khor Lye Choon* [2011] 2 PIR 6 where the award was much higher at RM350,000 and *Sosmatrides v. Ko Knee Keng* [2015] 1 PIR 9 which involved the award of RM300,000.

[17] The respondents primarily contended that RM200,000 is an exaggerated sum as the appellant's appearance in court did not suggest that he suffered from the kind of disabilities warranting an award of RM200,000. The award of RM42,000 is also within the range of RM22,000 to RM49,000 for memory impairment as set out in the compendium for personal injury awards.

[18] In my assessment, even though the appellant submitted a much higher figure of award for moderate head injury, a review of the report by the Neurosurgeon for the defendant (Sunway Medical Centre) would disclose a conclusion that is generally favourable medically in the sense that there are no significant neurologic deficits, apart from a degree of memory impairment, described as a mild impairment of short term recall. I must emphasise that this report was the most recent out of all the medical reports, having been issued some 17 months after the accident. Even more relatively recently, I further observe that from the notes of evidence of the proceedings at the Sessions Court, in particular relating to the testimony of the appellant, including when given during cross-examination, too did not suggest that the appellant was in any discernible manner adversely affected in terms of his orientation, powers of reasoning, comprehension and recall.

[19] I further agree with the relevance of *Mohd Norazuan Norhaslim v. Tan Beng Yok* [2014] 1 PIR 44 and *Muhammad Hamzi Omar v. Jemilah Ahmad* [2013] 1 PIR 52 to the instant case for even though counsel for the appellant argued these two cases concerned mild and not moderate injury, the facts of the cases actually reveal that the kind of injuries sustained by the claimants therein are not so different from that which relates to head injury in the instant case. In *Mohd Norazuan bin Norhaslim*, the award was RM30,000 and for *Muhammad Hamzi bin Omar*, RM50,000. In the former for example, the award was for mild head injury with skull fracture, intracranial bleeding of extradural, subdural, intraparenchymal and subarachoid types, and post-concussion syndrome. Further, the award of RM42,000 by the Sessions Court is within the range for memory impairment of between RM22,000 and RM49,000 as per the compendium, is plainly not manifestly low nor tainted by any application of a wrong legal principle, and is thus reasonable and is to be affirmed.

Fracture Right Radius

[20] Counsel for the appellant argued that the award of RM12,000 for the injury is manifestly low for it was noted in the orthopaedic specialist report (Columbia Asia) that the appellant "will have residual pain over his right wrist joint." It was further highlighted that precedent cases with similar injuries had been given higher awards, such as RM40,000 in *Samsuri Lajis & Anor v. Mohd Asrul Mohamod* [2010] 1 PIR 7 and RM28,000 in *Mohd Redzal Hashim v. Wong Kwai Chuen* [2008] 1 PIR 7. The appellant argued that a reasonable award would be RM27,000.

[21] The respondents, on the other hand, contended that the medical reports did not list any disabilities arising from this injury, and that pain is a basic element arising out of the injury and not a form of disability.

[22] It is to be observed that in relation to the fracture of right radius, the award of RM12,000 is well within the range of award for fracture of radius pursuant to the compendium of RM11,000 to RM27,500. It is also within the range of award actually granted in precedent cases in that although counsel for the appellant submitted on the two cases which involved the award far beyond the range set by the compendium, the cases referred to by counsel for the respondents on the other hand clearly support the award of RM12,000 in the instant case. For the same injury, in *Lee Boon Leong v. Rubendran Balasegaran Pillai* [2014] 1 PIR 72 the award was similarly for RM12,000, and in *Azmal Zaim Ahmad Azmi v. Zainal Abidin Othman* [2014] 1 PIR 3, RM13,000. In any event, I also agree with the submission of counsel for the respondents that none of the specialist medical reports highlighted any specific disability arising from the fracture of the radius. As such, there is no justifiable basis in law to interfere with the award made by the trial judge.

Bilateral Lung Contusion

[23] The appellant argued that the award of RM8,000 for bilateral lung contusion is manifestly low, and suggested RM20,000 to be a more reasonable sum. The case of *Sugumaran Puvalan & Anor v. Mohd Faiz Abd Karim* [2011] 2 PIR 39 was cited by counsel for the appellant, where the award in that case was for RM10,000 in respect of contusion for one lung. In contradistinction, in the instant case, the appellant suffered contusion in relation to both lungs, thus fully justifying a higher award.

[24] Counsel for the respondent principally submitted that the specialist medical report (Kempas Medical Centre) had observed that the appellant did not face breathing difficulties. The relevant extract of the report stated thus:

> His breathing was not labored and air entry was equal bilaterally with resting respiratory rate of 22-24 per minute. There was no pain on chest compression ...

[25] It is my view that as for bilateral lung contusion, considering the specialist report from Kempas Medical Centre which did not highlight any breathing problem, the award of RM8,000 by the Sessions Court is to be retained, more so as in cases such as *Yusof Mohamed v. Lee Mok Sing* [2014] 1 PIR 64 and *Muhammad Hazwan Abd Rahman v. Heng Peoy* [2014] 1 PIR 46, both involving lung contusion, the awards were lower at RM2,500 (left side contusion only) and RM5,000 respectively. Even though the case of *Sugumaran* referred to by counsel for the appellant involved a higher amount with contusion affecting only one lung, the other cases referred to above and decided later demonstrate that the range awarded by the courts would not render the award of RM8,000 to be in any manner manifestly low so as to justifiably attract appellate intervention.

Right Haemopneumothorax (With Chest Tube Inserted)

[26] The appellant submitted that the award of RM6,000 is even lower than the proposal by the respondents and that a reasonable amount ought to be RM15,000 for haemopheumothorax with chest tube inserted in light of a recent case of *Boon Chin Fatt v. Yii Chee Wee & Anor* [2014] 1 LNS 1351; [2014] AMEJ 1282, also involving haemopheumothorax (left) with chest tube inserted where the High Court awarded RM15,000. The respondents on the other hand maintained that precedent cases suggest that the award of RM5,000 is reasonable.

[27] As for the award claimed for right haemopneumothorax (with chest tube inserted), in my evaluation, the award by the Sessions Court of RM6,000 should be affirmed because it is neither unreasonable nor in any way manifestly low and especially since in light of similar precedent cases cited by counsel for the respondents such as *Mahenthiran Anpalakan v. Krishna Rao Sree Ramaloo & Anor* [2012] 2 PIR 53 and *Leong Sit Mooi & 3 Ors v. Ahmad Tajudin Ali & Anor* [2014] 1 PIR 31 where the award in both cases was only RM5,000.

A **Fracture of Right First Rib**

[28] The appellant does not challenge the award of RM4,000 for the fracture but argued that the Sessions Court ought to have also awarded for the fracture of the right seventh and eighth ribs as well, in view of the medical report from Kempas Medical Centre which stated that "CXR showed
B evidence to suggest right 7th and 8th rib fractures." The respondents on the other hand maintained that the appellant had failed to prove fracture to the seventh and eighth ribs for the Sessions Court must have relied on the medical report issued by Hospital Sultanah Aminah which is specific in stating only the fracture to the right first rib.

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[29] I am of the view that the trial court was fully entitled to have given more weight to the definitive finding as recorded in the medical report of Hospital Sultanah Aminah on this specific point. The appellant argued that, applying the Supreme Court case of *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300; [1994] 3 MLJ 361 which held that once
D the claimant had established that the defendant's car had collided into him, there was *prima facie* case that all injuries were caused by the collision, the respondents in the instant case have however failed to give evidence to rebut the *prima facie* case. In my view however this principle can only more relevantly apply if the respondents are entirely liable for the collision, which
E is plainly not the position in the instant case where the issue of liability had been agreed by consent of the parties. Further, the said evidence of fractures was not recorded in the other reports such that the existence of the alleged injuries itself is reasonably disputed, not to mention unproven, and may not therefore even qualify to give rise to a *prima facie* case in the first place. The
F award of the Sessions Court is therefore affirmed.

Right Anterior Mediastinal Haematoma

[30] Similarly, I am also of the view that the awards given by the Sessions Court for right anterior mediastinal haematoma of RM2,500 ought to be
G maintained for it is within the range of the award for "external injuries: haematoma" listed in the compendium. I do not agree with the argument of the appellant that being a form of an internal injury, the correct range stated in the compendium which ought to have been adopted is the one referable to "Diaphragm damage" (of RM16,500 to RM19,500) on account of the fact that the diaphragm is contiguous to the mediastinum structure. This
H contention is untenable for the mediastinum structure itself is made up of posterior, middle and anterior segments. It is important and cannot be emphasised enough that the court ensure that a claimant is compensated only for the losses he suffered as a result of the negligence of the tortfeasor and not to unjustly enrich the former (see *Ong Ah Long v. Dr S Underwood* [1983]
I 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324).

Other Items Of "Injuries"

[31] Nor can it be said that the Sessions Court had applied a wrong principle of law in rejecting claims for awards for tracheostomy (which essentially is a medical procedure, and not a form of injury), right pleural thickening (noted only in the medical report issued by Kempas Medical Centre more than a year after the accident, but not clarified at trial whether also found at the material time of the injuries sustained due to the accident), incisional hernia, small bowel obstruction, post-traumatic seizure, residual pain due to soft tissue injury (not recorded in any of the specialist and medical reports, and RM10,000 had already been awarded for scars), muscle-wasting (not recorded in any of the specialist and medical reports), loss of hair (not identified as an injury in any of the specialist and medical reports) and tachycardia (which is more of a non-permanent medical condition). I should add that the absence of awards for the rest, namely incisional hernia, small bowel obstruction and post-traumatic seizure is in my judgment, justified on the basis that these are matters which have not occurred and indeed may never occur. For incisional hernia and small bowel obstruction, the report issued by Kempas Medical Centre observed that these are "events that may or may not occur", and for seizure, the report from Sunway Medical Centre noted that the appellant would merely stand at a higher risk of developing post traumatic seizure at between about 2% and 5% compared to the general population. I am of the view that based on the medical reports and the totality of evidence made available before the trial judge, noting in particular that the observation in respect of each of the events was made in only one report and not similarly found in any other, based on the civil standard of proof applicable in the country, it was not proven by the appellant on a balance of probabilities that the risks, danger or possibility of these events happening are significant and not speculative.

Actual Loss Of Earnings

[32] In respect of the claim for actual loss of earnings which is not allowed by the Sessions Court, I am however satisfied that based on the employment letter and salary slips as well as evidence by SP4, being the appellant's employer (*albeit* also his brother), as well as case law authorities concerning sufficiency of evidence of employment, such as *Mohamad Khirul Mizan Shafie & Anor v. Yue Ah Kai* [2002] 8 CLJ 672; [2002] 6 MLJ 471, *Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 and *Fatimah Derakman v. Wan Jusoh Wan Kolok & Anor* [1994] 4 CLJ 537, the appellant has proven on a balance of probabilities his claim for loss of earnings. I award RM28,980 for actual loss of earnings (being 14 months x RM2,070), as submitted by the appellant. The decision of the Sessions Court on this point is therefore reversed.

A **Loss Of Future Earnings**

[33] In relation to loss of future earnings, based on the totality of evidence, I am of the view that the appellant has not successfully proven his case to claim loss of future earnings in light of case law authorities such as *Sumarni v. Yow Bing Kwong & Anor* [2008] 3 CLJ 489; [2008] 1 MLJ 608 and *Looi* B *Gnan Peng v. Bay Tong Hai* [2005] 1 CLJ 685 which required the appellant to prove not only that he was in good health but for the injury within the meaning of s. 28A(2)(c)(i) of the Civil Law Act 1956, but also that because of the injury he is not now able to earn in the future. The Court of Appeal in *Sumarni* stated as follows:

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> [14] Apart from the need to prove that she was in good health, the plaintiff must also show that it was 'but for the injury and that he (she) was receiving earnings by his (her) own labour or other gainful activity before he (she) was injured'. In respect of the latter i.e., was receiving earnings by her own labour or other gainful activity before she was
> D injured, I think the plaintiff has successfully satisfied this. But in respect of the former i.e., 'but for the injury', there must be evidence to show that but for the injury she is not able to earn in the future. This qualification of not being able to earn in the future must be read as a consequence to 'but for the injury' to give full effect to s. 28A(2)(c) of the Act which is basically intended to cater for loss of future earnings as a result of
> E personal injury. So even if the plaintiff has proved that she was in good health but for the injury, she still has to prove that because of this she is not able to earn in the future. On this requirement, case law demands that there must be evidence of real substantial assessable loss i.e., loss that is capable of assessment at the date of trial, and this must be proved by evidence, not by mere speculation and it should not be remote, *Ngooi Ku*
> F *Siong & Anor v. Aidi Abdullah*.

In my view, even considering the medical evidence, which described the disabilities experienced by the appellant and deemed capable of affecting employment prospects to be merely mild in nature, and including taking into account his current situation, the appellant could not demonstrate evidence
G of real substantial loss that is capable of assessment which is not remote or speculative. Accordingly, the decision of the Sessions Court in not awarding loss of future earnings is to be affirmed.

Loss of Earnings Capacity

H **[34]** In respect of loss of earnings capacity, the principle established by case law such as *Chong Chee Khong & Anor v. Ng Yeow Hin* [1997] 4 CLJ Supp 17; [1997] 5 MLJ 786 made it clear that in considering the award for loss of earnings capacity, the key test to be applied is whether the claimant would face substantial risk of losing his job or getting lesser paid employment. The
I Court of Appeal in *Sumarni* also made it explicit that before an award of this nature can be entertained, there must be evidence to show that the appellant will face a real or substantial risk in his earning capacity being affected in the future due to any disability he might have sustained from the motor

accident. On the totality of evidence, including the Consultant Neurosurgeon Specialist Medical Reports from Putra Specialist Hospital Melaka and that from Sunway Medical Centre which described the deficits and disabilities deemed capable of affecting employment prospects of the appellant as merely being mild, and taking into account the present conditions of the appellant, I am of the view that the appellant has not proven on a balance of probabilities that the injuries would lead to such a consequence. Accordingly, I hold that the finding of the Sessions Court in awarding loss of earnings capacity of RM20,000 to the appellant ought to be reversed for lack of evidential support.

Conclusion

[35] In conclusion, based on the foregoing reasons, I find that the appellant has not successfully proven his claim for the awards in this appeal on a balance of probabilities, apart from in respect of actual loss of earnings which is allowed. However, the award for loss of earnings capacity made by the Sessions Court is reversed and set aside. Subject to these two items, the decision of the Session Courts is affirmed and this appeal is therefore dismissed, with costs.